



International Comparative Jurisprudence



THE EUROPEAN UNION AS A UNION OF DEMOCRACIES, JUSTICE AND RIGHTS ¹

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Madam Minister of Justice, Honourable Members of the *Seimas*,
Honourable Members of the Senate of the Mykolas Romeris University,
Honourable Rector and Vice-Rectors, Distinguished Guests,

I accept this honour with deep gratitude and great humility. In doing so, I am delighted to become an honorary member of this prestigious University that bears the name of Mykolas Romeris, a man whose academic writings, legal practice and political convictions inspire us all to remain committed to the values of democracy, the rule of law and fundamental rights.

As you all know, Mykolas Romeris is considered to be one of the founders of Lithuanian constitutional law and that is why I would like to take this opportunity to pay tribute to his legacy by looking at the European Union (the 'EU') from a constitutional law perspective.

Examining the EU from a constitutional perspective is something of a challenge, given that, unlike most nation-States, the EU lacks a foundational document adopted by a European 'demos'.

That said, constitutional law, as an academic discipline, has evolved to the point where it is no longer limited to examining national constitutions but also encompasses the broader field of study denoted by the term 'constitutionalism'. 'Constitutional law beyond the State' may involve the study of any system of norms that enshrines a commonality of values on which a union of sovereign States and their peoples is founded. Understood in this way, constitutionalism may operate even in the absence of a unitary 'demos' and outside the confines of the nation-State.

When it comes to constitutionalism within the EU, one may therefore set aside the objection that the EU lacks a constitution, choosing instead to follow a functionalist approach when examining the main features of the Union. In that regard, the EU Treaties and the EU Charter of Fundamental Rights (the 'Charter') are called upon, just like national constitutions, to fulfil three basic functions. First, by laying down a catalogue of fundamental rights, including political rights, the Charter serves to protect a sphere of individual self-determination which public authorities are bound to respect. Second, the EU Treaties allocate power between the EU and the Member States as well as between the different EU institutions. Third, the Treaties help to preserve the autonomy of the EU legal order by determining the way in which the EU is to interact with the wider world. Accordingly, the EU Treaties draw the dividing line between the EU legal order and public international law.

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² President of the Court of Justice of the European Union, Professor of European Union Law at Leuven University. All opinions expressed herein are personal to the author.

Most importantly, when fulfilling those three functions, the EU legal order is bound to respect the values of democracy, the rule of law and fundamental rights, values that are in keeping with the constitutions of the Member States. Needless to say, just as happens at national level, those three values are interdependent at EU level: there can be no democracy without the rule of law and fundamental rights; there can be no rule of law without fundamental rights and democracy, and there can be no respect for fundamental rights without democracy and the rule of law.

From a constitutional perspective, this means that the EU may be described as a ‘Union of democracies’, a ‘Union of justice’ and a ‘Union of rights’.

In creating a *Union of democracies*, the authors of the EU Treaties put in place a ‘dual structure of democratic legitimacy’. That structure is composed not only of the body of EU citizens collectively but also of the various individual peoples of Europe, organised in their Member States by their national constitutions.

This shows that the EU does not seek to supplant the democratic structures of the Member States, but rather to complement them. EU democracy must be driven by a mutually reinforcing relationship, whereby both sources of democratic legitimacy complement each other so as to create more democracy. EU democracy is thus composite in nature.

Accordingly, the EU may not interfere in matters for which it enjoys no competence. Nor may it exercise the competences that it shares with the Member States where EU action would have no added value: the EU must deliver better results than those that can be achieved at national level and may not go beyond what is necessary to achieve those results. That is why the EU Treaties stress the importance of national parliaments. Their active participation contributes to the proper functioning of the EU, notably by monitoring *ex ante* that EU draft legislation complies with the principles of subsidiarity and proportionality.

In order to protect the powers retained by the Member States, the European Court of Justice has time and time again held that purely internal situations do not fall within the scope of the EU internal market freedoms. That case law seeks therefore to shield the political process at national level from any encroachment by the EU political institutions in so far as that process applies to situations that are genuinely confined, in all respects, within a single Member State. In the same way, EU law is also respectful of the democratic choices made by national parliaments that seek to affirm a Member State’s identity. In *Runevič-Vardyn* (2011), a case concerning the spelling of an EU citizen’s name, the European Court of Justice held, in respect of the Lithuanian language, that ‘the Union must also respect the national identity of its Member States, which includes protection of a State’s official national language’.

Most importantly, in order to understand how EU democracy works, one must bear in mind that EU citizenship and national citizenship are not mutually exclusive, but complement each other. Every EU citizen should have a feeling of belonging both to the Member State of which he or she is a national and to the EU, without one feeling excluding the other.

Just as the EU institutions must refrain from interfering with national democratic choices that fall outside the scope of the Treaties, national democracies must, in turn, respect and, as the case may be, contribute to implementing EU legislation that does indeed fall within the scope of those Treaties.

In particular, democratic choices at national level may not deprive an EU citizen of his right to participate in the political life of the EU. Otherwise the EU, understood as a ‘Union of democracies’, would be undermined.

Member States are therefore under the obligation to ensure that Members of the European Parliament are elected by direct universal suffrage and that elections are free and secret. In *Delvigne* (2015), the European Court of Justice held that a Member State acts in fulfilment of that obligation where it adopts legislation that precludes nationals who have been convicted of a serious criminal offence from voting in elections to the European Parliament. That legislation

thus falls within the scope of EU law and must, therefore, comply with the Charter: in concrete terms, it must pursue a legitimate objective and comply with the principle of proportionality. As to the case at hand, the European Court of Justice found that the French legislation at issue did comply with the Charter since it pursued a legitimate objective – that of withdrawing the right to vote from those members of society who, in committing a serious criminal offence, have not behaved in a civic manner – and complied with the principle of proportionality since it took into account the nature and gravity of the criminal offence committed and the duration of the penalty.

In addition, the EU is also a ‘*Union of justice*’. This is because European integration can only proceed in keeping with the rule of law. Both the EU and the Member States must respect the ‘rules of the game’. Respect for the law must be at the heart of all policy- making in the EU.

Respect for the rule of law applies not only domestically, but also when the EU acts on the international stage: the EU may not incorporate international law obligations that run counter to the rule of law within the EU. In the seminal *Kadi I* (2008), for example, the European Court of Justice held that the EU could not give effect to a UN Security Council Resolution imposing economic sanctions on an individual where he had been deprived of any effective judicial protection. In the same way, in *Schrems* (2015), the European Court of Justice ruled that a transfer of personal data outside the EU could not take place where the third country receiving that data – in the case at hand, the United States – did not guarantee protection of the right to private life equivalent to that guaranteed by the Charter.

Since the EU is founded on the rule of law, judges, both at national and EU level, are called upon to play a pivotal role in the European integration project. Within the ‘Union of justice’, judicial power in the EU is not vested exclusively in the EU courts, but is rather shared between those courts and national courts. As a matter of fact, national judges are, as is said in French, « *les juges de droit commun du droit de l’Union* », an expression that may be translated into English as ‘the courts of general jurisdiction for EU law’.

It is for the European Court of Justice to say what the law of the EU is and for the national courts to apply that law to the case before them. Judicial cooperation takes places through the mechanism of the preliminary reference procedure. As the European Court of Justice held in Opinion 2/13 (2014) and I quote, ‘the [EU] judicial system [...] has as its keystone the preliminary ruling procedure [...] which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law’.

The uniform interpretation of EU law is inherently linked to the principle of equality before the law, a constitutional principle that lies at the very heart of the idea of justice. Justice is not done if EU law is applied more favourably in respect of some EU citizens than in respect of others.

When ensuring the uniform interpretation of EU law, the European Court of Justice does not seek to impose its authority on national courts by coercion, but rather to convince them by the force of the legal reasoning contained in its judgments. This shows that the relationship between the European Court of Justice and national courts is based not on hierarchy but on cooperation and mutual respect. Just as national courts trust the European Court of Justice to say what the law of the EU is, the European Court of Justice trusts national courts – in particular, national supreme and constitutional courts – to monitor the correct application of that law.

In order for the EU to be a true ‘Union of justice’, national courts must be free from any hindrance that might limit their capacity to engage in a direct dialogue with the European Court of Justice. For example, in *Ognyanov* (2016), the European Court of Justice was asked to examine a Bulgarian provision that obliged the referring court to disqualify itself from a pending case, on the ground that it set out, in its request for a preliminary ruling, the factual and legal context of that case. The rationale underpinning that provision was that the referring court was expressing a provisional opinion on questions of fact and law before deliberations had begun, which entailed not only that the judge was removed from the case and his final judgment set aside, but also that an action for damages could be brought against him for compensation in respect of a disciplinary offence.

The European Court of Justice ruled that such a provision constituted an obstacle to the proper functioning of the preliminary reference procedure. How could the European Court of Justice provide a useful answer to the referring court without knowing the factual and legal background of the case in the main proceedings? In that regard, the European Court of Justice held that the presentation of the relevant factual and legal context of the main proceedings by the referring court is a response to the requirement of cooperation that is inherent in the preliminary reference mechanism and cannot, in itself, be a breach of either the right to a fair trial or the right to the presumption of innocence guaranteed by the Charter. Furthermore, it recalled that the choice of the most appropriate time to refer a question for a preliminary ruling lies within the exclusive jurisdiction of the referring court. Accordingly, whilst the referring court is to give full effect to the interpretation of EU law provided by the European Court of Justice, no provision of EU law prohibits the referring court from altering, after the delivery of the preliminary ruling, its findings in respect of the relevant factual and legal context. Thus, by virtue of EU law, the referring court was both empowered and required to set aside that conflicting provision of Bulgarian law.

Last but not least, the EU is a ‘*Union of rights*’. As the *Kadi I* and *Schrems* judgments illustrate, this means that fundamental rights are part and parcel of the rule of law within the EU. They enjoy constitutional status and may thus limit other constitutional principles on which the EU is founded.

This is the case, for example, of the principle of mutual trust, a principle that defines the way in which the Area of Freedom, Security and Justice is to operate. In accordance with that principle, the Member States are all deemed to guarantee a level of fundamental rights protection that is at least equal to that guaranteed by the Charter. This means, in essence, that the Member State where execution of a judgment is sought must, in principle, trust that the Member State where that judgment was delivered effectively protects the fundamental rights recognised in the Charter.

However, as the European Court of Justice has made clear in cases such as *N.S.* (2011) and *Aranyosi and Căldăraru* (2016), the principle of mutual trust is by no means absolute but may, in exceptional circumstances, be subject to limitations. Those exceptional circumstances may arise where an asylum seeker or a person who is the subject of a European arrest warrant runs the risk of being subjected to inhuman or degrading treatment, because of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in the Member State of origin or because the prison facilities where the person concerned is likely to be incarcerated are overpopulated or prison cells are too small.

The EU as a Union of rights also means that the EU principle of democracy cannot be understood as the ‘tyranny of the majority’, but that democratic choices at EU level must always respect a personal sphere of self-determination that is free from public interference. Accordingly, democratic choices at EU level may not impose disproportionate limitations on the exercise of fundamental rights. This has been made clear by the European Court of Justice which has not hesitated to declare invalid EU legislation that was in breach of fundamental rights.

In *Digital Rights* (2014), the European Court of Justice declared invalid the Data Retention Directive, a directive that obliged telephone and internet providers to retain bulk metadata that made it possible to know the identity of the person with whom the user had communicated and the means by which that communication had been effected, as well as to identify the time and the place of the communication, and, moreover, to ascertain the frequency with which the subscriber or registered user communicated with certain persons during a given period. The European Court of Justice reasoned that that directive was a disproportionate limitation on the rights to privacy and to the protection of personal data because it failed to set out either substantive or procedural criteria determining the circumstances under which national authorities could have access to the data.

Furthermore, the EU as a Union of rights also means that the fundamental rights recognised in the Charter offer the same level of protection regardless of whether limitations to those rights are adopted at national or EU level. The EU system of fundamental rights protection does not apply double standards. For example, a joint reading of cases such as *Kadi II* (2013) and *ZZ* (2013) shows that both EU institutions and Member States are subject to the same standards

of effective judicial protection where disclosure of evidence is limited on public security grounds. In the same way, *Digital Rights* (2014) and *Tele2 Sverige and Watson e.a* (2016) demonstrate that, when it comes to the right to privacy, both the EU and national legislators are subject to the same standards of protection.

Moreover, as a Union of rights, the EU does not oppose the idea of establishing a system of fundamental rights protection that influences and is influenced by both national and international law. Just as the European Court of Justice looks to the common constitutional traditions of the Member States and the case law of the European Court of Human Rights when interpreting the Charter, those courts have also drawn inspiration from the case law of the European Court of Justice when interpreting national constitutions and the ECHR.

Given that the common mission of all those courts is, first and foremost, to serve the individual by providing him or her with effective judicial protection, they must indeed work together so as to ensure that all of the different systems of fundamental rights protection that occupy the European legal space are in harmony with one another.

From a constitutional perspective, the EU is, above all, a *Union of values* that respects national identities. Provided that respect for democracy, the rule of law and fundamental rights is ensured, the EU allows plenty of scope for value diversity. Ultimately, this is because all Europeans, regardless of their cultural and historical heritage, share and cherish those values that define us as EU citizens and, more importantly still, as human beings.

In times where some voices strive to call into question the EU as a whole, we must not forget, as the life of Mykolas Romeris and others of his generation illustrate, that respect for democracy, the rule of law and fundamental rights cannot be taken for granted. Whilst the EU may require improvement in various respects, there has never been a time in European history when those three essential values were so universally and comprehensively respected in all the four corners of Europe as is the case today. That is why I dedicate this doctorate *honoris causa* to Mykolas Romeris.

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